

1 D. Victoria Baranetsky (Cal. Bar No. 311892)
2 THE CENTER FOR INVESTIGATIVE
3 REPORTING
4 1400 65th St., Suite 200
5 Emeryville, CA 94608
6 vbaranetsky@revealnews.org
7 Telephone: (510) 982-2890

8 Attorney for Plaintiff

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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 THE CENTER FOR INVESTIGATIVE
14 REPORTING and WILL EVANS,

15 Plaintiffs,

16 v.

17 U.S. DEPARTMENT OF LABOR,

18 Defendant.

Case No. 3:19-cv-05603-SK

**DECLARATION OF PROFESSOR DEEPA
VARADARAJAN IN SUPPORT OF
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AND CROSS MOTION FOR SUMMARY
JUDGMENT**

1 I, DEEPA VARADARAJAN, declare:

2 1. I, Deepa Varadarajan, have personal knowledge of the matters stated in this
3 declaration. If called upon to do so, I am competent to testify to all matters set forth herein.

4 2. I am an assistant professor of legal studies in the Department of Risk Management &
5 Insurance at the J. Mack Robinson College of Business at Georgia State University with a
6 secondary appointment at the George State University College of Law.

7 3. My research focuses on trade secrecy and intellectual property laws, and I have
8 published several articles on these topics, including a forthcoming law review article about
9 Exemption 4 after *Argus Leader*, which draws extensively on my trade secrecy research. In
10 general, my scholarly work explores how intellectual property laws—and in particular, trade secret
11 laws—create incentives for and pose risks to cumulative innovation.

12 4. I earned a Bachelor of Arts degree from the University of Texas Austin and earned my
13 Juris Doctorate from the Yale Law School. Prior to coming to Georgia State University, I was an
14 assistant professor of law at St. John's University School of Law and a Thomas C. Grey Law
15 Fellow at Stanford Law School. Before becoming a professor, I worked as a litigation associate and
16 completed two clerkships.

17 5. In my research, I explain how firms have invoked trade secret laws to apply to an
18 increasingly wider array of subject matter in recent decades. Under modern statutes such as the
19 Defend Trade Secrets Act (DTSA), almost any type of technical or business information can
20 potentially fall within the definition of a trade secret. To obtain protection, a trade secret owner
21 need not formally apply for protection nor register trade secrets with any federal or state agency.

22 6. Because of the relaxed standard described above, a firm's secrecy efforts and
23 designations of confidentiality often drive the identification of trade secrets. Firms increasingly
24 rely on trade secret protection to protect intangible assets, and consequently, there has been a
25 significant increase in civil litigation rates for trade secrecy over the last several decades.

26 7. While most trade secret cases involve departing employee-defendants accused of
27 violating confidentiality duties, in my research, I describe how some firms have invoked trade
28 secrecy to avoid scrutiny by regulators or negative publicity by news media outlets—even when

1 the public has a significant interest in learning the relevant information, such as when it might
2 reveal corporate wrongdoing or mismanagement of government resources. In these contexts, firms’
3 assertions of trade secrecy over information like source code and vendor pricing data may not only
4 impact the government’s oversight function but also the public’s oversight function—to understand
5 government decision-making and hold the government accountable. While Exemption 4 was
6 intended to enhance private sector information-sharing with the government, it was not meant to be
7 a tool to shield government action and decision-making from public view.

8 8. In my research, I explain how the altered standard for confidentiality under *Argus*
9 *Leader* tracks, in some ways, the modern evolution and expansion of trade secrecy. That is, in both
10 contexts, FOIA Exemption 4 and civil trade secrecy law, strict definitional constraints on
11 proprietary business secrets have largely been replaced by an analysis focusing on the non-public
12 nature of information and a firm’s secrecy customs. Yet the expanded standard for business secrecy
13 in the context of FOIA Exemption 4 is particularly worrisome, not only because it directly
14 implicates government accountability, but also because the procedural posture of FOIA requests
15 lacks some of the inherent safeguards of civil trade secrecy litigation. For example, because civil
16 trade secrecy litigation often involves employee defendants, a plaintiff’s broad assertions of
17 proprietary secrets typically will be limited by an employee’s own “general knowledge, skill and
18 expertise.”

19 9. In my research, I describe how the likely effect of *Argus Leader* will be to render
20 Exemption 4’s narrower definition of “trade secrets” irrelevant. Also, FOIA’s recognition of
21 business secrecy may sweep even more broadly than its civil trade secret law counterpart for
22 reasons such as those described above. These dynamics suggest the need for additional checks on
23 submitters’ assertions of confidentiality and agency deference to those assertions under FOIA.

24 10. In my research, I describe how policy-makers have, in recent years, demonstrated an
25 increased willingness to reign in trade secrecy’s definitional breadth through targeted, statutory
26 safe-harbors. For example, the federal DTSA includes an explicit “whistle-blower” immunity
27 provision. Similarly, in the realm of public health, commentators have argued that certain kinds of
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1 pricing information for drugs and medical devices should be excluded from trade secret protection
2 as a matter of sound public policy.

3 11. In my research, I explain how the absence of an “economic harm” requirement in the
4 aftermath of *Argus Leader* will likely lead to increased withholding of information of questionable
5 commercial character. Requiring a submitter to offer some articulation of economic harm
6 stemming from the disclosure of requested information would likely be a step in the right direction
7 in terms of policy and incentives.

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9 I declare under penalty of perjury of the laws of the State of California that the
10 foregoing is true and correct to the best of my knowledge and belief.

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12 Executed April 23, 2020 in Atlanta, GA.

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14 /s/ Deepa Varadarajan
15 Prof. Deepa Varadarajan
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